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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 39

THE UNITED STATES, PETITIONER

v.

THE TORONTO, HAMILTON AND BUFFALO NAVIGATION COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 14-25) is reported at 112 C. Cls. 240.

JURISDICTION

The judgment of the Court of Claims was entered on December 6, 1948 (R. 25). The petition for a writ of certiorari was filed on March 3, 1949, and was granted on May 2, 1949. The jurisdiction of this Court rests upon 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether the just compensation payable for a vessel requisitioned by the United States in 1942, after an eight-year period of idleness, may be determined on the basis of capitalization of the earnings realized from the enterprise in which the ship was used during the period from 1916 to 1932.

2. Whether, in determining just compensation for a vessel requisitioned in 1942 on the Great Lakes, the court may disregard a definite demand and prices prevailing for such vessels in that area because they did not reflect the most profitable use for which the vessels were physically adaptable, in favor of a more profitable demand on the Atlantic coast of Florida, in the absence of any showing or finding that the owner would have availed himself of the latter market.

STATUTE INVOLVED

The pertinent provisions of the Merchant Marine Act of 1936, as amended, 53 Stat. 1254, 1255, 46 U.S.C. 1242, are set forth in the Appendix, *infra*, pp. 44-45.

STATEMENT

The findings of the Court of Claims (R. 4-14) disclose the following pertinent facts:

1. The *Maitland No. 1*, a car ferry, was built in 1916 for the carriage of railway freight cars on the Great Lakes. The vessel had a gross tonnage of 2,757 tons, with four railroad tracks on the car deck, having a capacity of 30 freight cars of the

size in use in 1916, or 26 of the larger, modern type in use in 1942 (Finding 6, R. 5). The vessel cost the original owner approximately $362,800. In August 1916, respondent acquired the vessel at a cost of $394,560, a mark-up of about 8.75 per cent (Finding 7, R. 5). Expenditures of $38,115.46 were made by respondent from 1917 to 1930 for additions and betterments to the vessel (Finding 8, R. 5).

From October 1916 to June 1932, respondent operated the *Maitland No. 1* on Lake Erie, between the ports of Ashtabula, Ohio, and Port Maitland, Canada, a distance of 91 miles. The vessel carried commodities loaded in freight cars moving between points in the Pittsburgh area, served by the New York Central Railroad, and points in Canada served by the Toronto, Hamilton and Buffalo Railway Company, and afforded a short cut from the rail route, which moved around the end of Lake Erie and through the congested Buffalo area (Finding 9, R. 5-6).

The *Maitland No. 1* was the only vessel owned and operated by respondent on its car ferry line. Respondent's chief source of revenue was derived from the transportation of bituminous coal to Canada, and its annual income over the sixteen and one-half years of operation fluctuated in accordance with the coal carried. From August 12, 1916, to January 1, 1921, respondent's average annual net operating income was $17,216.28. In 1921 and 1922, the car ferry was operated at a net

loss. During the next five years (1923 to 1928), the net operating income averaged $129,893.92 per annum. In 1928, the net operating income declined sharply below the 1927 earnings. This downward trend continued in 1929 and the vessel was operated at a loss in 1930, 1931, and 1932. By June 1932, traffic handled by the vessel had decreased to the extent that respondent laid up the vessel. The operation of the car ferry line was never resumed after that date. For the entire period from August 12, 1916, to June 30, 1932, respondent's annual average net income from the *Maitland No. 1* was $42,816.36, before Federal income taxes. This amounted to 10.41 per cent of respondent's investment (Finding 10, R. 6-7).

The sharp decline in respondent's net operating income from the *Maitland No. 1* in 1928 and 1929 was solely the result of a diversion of traffic to other routes. Prior to 1928 the bulk of traffic handled by respondent consisted of bituminous coal for movement to the Steel Company of Canada at Hamilton, Ontario. In August, 1928, this traffic was diverted to Sodus Point, New York, for movement across Lake Ontario to Hamilton. Most of the remaining traffic was lost in 1932 when the new Welland Canal was opened, enabling lake vessels to take shipments directly to Lake Ontario points. Since June 1932, there has been insufficient traffic available to justify ferry operation (Finding 11, R. 7-8). The vessel remained laid up until November 1935.

On November 29, 1935, respondent chartered the *Maitland No. 1* to the Nicholson Universal Steamship Company, which covered the tracks on the car deck with planking and used the vessel to carry freight across Lake Michigan. On February 10, 1936, an agreement was made whereby title to the *Maitland No. 1* was transferred to Nicholson for a total consideration of $166,000, and respondent retained the right to recapture the vessel within a specified time. Respondent exercised this right on December 15, 1937, reacquiring title for $92,894.80 (Finding 12, R. 7-8).

Thereafter the vessel was again laid up at Ashtabula, Ohio, the captain and chief engineer remaining on board as shipkeepers, and minor repairs were made from time to time. From January 1, 1938, to August 20, 1942, the average annual cost of repairs was about $300.

2. On August 20, 1942, the War Shipping Administration, acting pursuant to the Merchant Marine Act of 1936, as amended, 46 U.S.C. 1242, requisitioned title to, and possession of, the *Maitland No. 1* on Lake Erie. (Finding 2, R. 4). The next day, a representative of the War Shipping Administration surveyed the vessel and estimated the repairs necessary to place her in operating condition at $34,980 (Finding 14, R. 9). Shortly after the requisition, the War Shipping Administration removed the machinery from the vessel and sold the hull to a purchaser who converted it into a barge (Finding 2, R. 4).

On April 20, 1943, the War Shipping Administration fixed the sum of $72,500 as just compensation for the *Maitland No. 1* (Finding 3, R. 4). On December 21, 1943, respondent notified the War Shipping Administration that the amount fixed by it was unsatisfactory and that it elected to exercise its statutory right to receive 75 per cent of the award without prejudice to its right to sue for additional compensation. On June 10, 1944, respondent was paid the sum of $54,375 (Finding 4, R. 4).

On May 15, 1945, respondent, alleging that the fair value of the vessel was $766,128 (R. 2),[1] brought suit in the Court of Claims to recover additional compensation for the taking of the *Maitland No. 1* (R. 1-3).

3. The lower court found that "At the time she was requisitioned, the use to which the *Maitland No. 1* was best adapted was as a car ferry on the Great Lakes. At that time, however, there was no

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[1] On the date of requisition, the book value of the vessel, as shown on respondent's records was $75,509.51 (Finding 15, R. 9). This book value had been computed by deducting annual depreciation of four per cent from the $92,894.80 paid by respondent to Nicholson Universal Steamship Company on the "recapture" of the vessel, as described above (*supra*, p. 5). However, since the respondent had initially taken depreciation from October 1, 1916, to December 31, 1919, at a rate of one per cent per annum and thereafter at the annual rate of four per cent, if the sale to Nicholson and the subsequent recapture are ignored as not representing *bona fide* sales, the net book value on August 20, 1942, would have been $37,096.13. From January 1, 1938, to August 20, 1942, respondent maintained insurance on the *Maitland No. 1* based on a valuation of $100,000 (Finding 16, R. 9).

demand for the vessel as a car ferry on Lake Erie and there is no satisfactory proof that there was any demand for her for use as a car ferry elsewhere on the Great Lakes." (Finding 17, R. 9-10).

Most operation of car ferries on the Great Lakes has centered on Lake Michigan and the Detroit River. The only car ferries which have ever operated elsewhere on the Great Lakes, so far as the present record discloses, are the *Maitland No. 1,* the *Ashtabula,* owned by the Pennsylvania Railroad, and the *Marquette and Bessemer No. 2,* jointly owned by the Marquette and Bessemer Dock and Navigation Company and the Pere Marquette Railway Company, all three of which operated across Lake Erie from Ohio to Canada. As noted above, lack of traffic and its diversion to other routes had caused respondent to take the *Maitland No. 1* out of service in the middle of 1932. The Pennsylvania Railroad continued the operation of its car ferry, since unlike the New York Central, it did not control a rail route into Canada. Neither in 1942 nor at any time subsequent thereto has the Pennsylvania Railroad required an additional car ferry to handle its traffic. The *Marquette and Bessemer No. 2,* referred to above, was laid up in 1931, was not operated thereafter, and was sold in March 1942 for $37,724.04.

With the exception of car ferries operated across the Detroit River, where an entirely different type of boat was used under different traffic conditions, the balance of the car ferries on the Great Lakes

operated across Lake Michigan, chiefly between points in Michigan and in Wisconsin. Until about 1930, these car ferries held a competitive advantage over the all-rail transportation, both in respect of time and rates. By 1930, the railroads completed "an outer belt" railroad around the City of Chicago, thus avoiding long delays, and the car ferry rate differential was abolished. Also, changes in traffic on the ferry lines required more clearance between the car decks and the cabin decks of the vessels. Thereafter, the ferry lines were unable to compete successfully with the all-rail routes. Vessels of the *Maitland No. 1* type became obsolete for further use as car ferries on the Great Lakes. By 1936 the majority of these outmoded car ferries had been laid up and were replaced by larger vessels, having greater speed, larger cargo capacity and passenger facilities (Finding 17, R. 9-10).

Accordingly, in 1942, the only demand on the Great Lakes for the *Maitland No. 1* was for a number of secondary uses, but such a demand for non-car-ferry uses did exist (Finding 18, R. 10). Between 1936 and 1940 three car ferries, similar to the *Maitland No. 1,* which had been laid up for a number of years, were sold for conversion to highway ferries (for transporting automobiles and passengers) in the Great Lakes area. In 1936, the Ann Arbor Railroad sold the car ferry *Ann Arbor No. 4,* which was smaller than the *Maitland No. 1,* to the Michigan Highway Department for $25,000. In 1938, the Pere Marquette Railway Company sold the car ferry *Pere Marquette No. 20,*

which had been built in 1903 from the same plans as the *Maitland No. 1*, to the Michigan Highway Department for the price of $50,000, plus an additional $10,000 for delivering the vessel across Lake Michigan to a shipyard. In 1940, the Pere Marquette Railway Company sold the car ferry *Pere Marquette No. 17*, which had been built in 1901 from the same plans as the *Maitland No. 1*, to the Michigan Highway Department for $65,000 (Finding 18, R. 10-11). Although the *Pere Marquette Nos. 17* and *20* were comparable to the *Maitland No. 1* in size, carrying capacity, speed and design, they were in a poorer state of repair on the dates sold than was the *Maitland No. 1* on the date of requisition (Finding 19, R. 11).

In 1940 and 1942, two other obsolete car ferries, which had been laid up and which likewise were in a poorer state of repair than the *Maitland No. 1*, were sold to purchasers who removed the engines from the boilers, tore off the superstructure of the vessels, and used them as bulk carriers of pulpwood. In July 1940, the Pere Marquette Railway Company sold the *Pere Marquette No. 19* for $24,000. The vessel was built from the same plans as the *Maitland No. 1* and was a sister ship of the *Pere Marquette No. 20*, referred to above. In March, 1942, the *Marquette and Bessemer No. 2* was sold for $37,724.04. She had been built in 1910 from the same plans as the *Maitland No. 1*, was jointly owned by the Marquette and Bessemer Dock and Navigation Company and the Pere Marquette Rail-

way Company and had formerly been used as a car ferry on Lake Erie (Finding 21, R. 13-14).

4. In addition to these findings as to the status of the Great Lakes demand for car ferries, the Court of Claims found that there was a demand in 1942 on the Atlantic Coast for vessels such as the *Maitland No. 1* for use as a car ferry between Florida and Cuba (Finding 20, R. 12).

In May, 1941, the Florida East Coast Railroad Company sold the *Henry M. Flagler*, a car ferry which had operated between Florida and Cuba, for $100,000. The *Flagler* was built in 1914 from substantially the same plans as the *Maitland No. 1* but was equipped to operate in and had been used in salt water. As in the case of the *Maitland No. 1* the *Flagler* had been laid up for ten years prior to the sale. Between May, 1941 and July 28, 1941, the purchaser expended $65,820 for necessary repairs. On July 28, 1941, the W.S.A. requisitioned the vessel and appraised her value at $170,000, which the owner accepted as just compensation (Finding 20, R. 12).

In June, 1942, the W.S.A. requisitioned two ocean-going car ferries, the *Joseph R. Parrott* and the *Estrada Palma*—comparable in age, dimensions and construction to the *Maitland No. 1*—which were owned by the Florida East Coast Railroad Company and had been operated by that company between Florida and Cuba. By negotiation between the parties, a value of $332,500 for each ves-

sel was agreed upon, and the company accepted $665,000 in full payment (Finding 20, R. 12-13).

Shortly after the cessation of hostilities in World War II, the Grand Trunk Railway Company sold the *Grand Haven*, a car ferry formerly operated on the Great Lakes, for $50,000. The *Grand Haven* was built in 1903, was smaller than the *Maitland No. 1* but had more speed and power. At considerable expense, the amount of which is not shown in the record, she was floated down the Mississippi River and converted for use as a ferry between Florida and Cuba (Finding 20, R. 12).

At the time of the requisition of the *Maitland No. 1*, it would have cost not less than $115,000 to move her to the Atlantic Coast and fit her for operation in salt water. In addition, some strengthening of the framing would probably have been required before the *Maitland No. 1* could be classified for ocean-going service. There is no evidence as to how much these additional changes would have cost (Finding 20, R. 13).

5. After making the foregoing findings, the court concluded, in its opinion, that the fair value for the *Maitland* must be determined as of the putative Florida location, and that since the sales transactions described above did not establish a sufficiently fair and adequate value for the vessel, resort must be had to other methods to establish her value (R. 22-23). Despite the fact that the *Maitland No. 1* had been laid up since June 1932, and respondent had filed an application with the

Interstate Commerce Commission on February 11, 1943, for leave to abandon its car ferry line because "traffic is not available in sufficient quantities to warrant continued operation, even if a suitable car ferry were available" (Finding 11, R. 8), the court declared "we are compelled to resort to a consideration of the earnings of the *Maitland No. 1* during the time the vessel was actually operated as a car ferry, in conjunction with the contemporaneous transactions in vessels of close similarity in determining a fair value" (R. 23).

Attributing an average mean residual value of $50,000 to the *Maitland No. 1* as an obsolete car ferry, the court capitalized the average annual income of $42,816.36 received from 1916 to 1932 at an annual rate of 10 per cent for the estimated 24 years of useful life remaining, and arrived at the sum of $389,767.15 (R. 23). The court then noted that "This figure approximates the amount paid by defendant [the United States] to Florida East Coast Car Ferry Company for the car ferries, *Joseph R. Parrott* and *Estrada Palma*" (R. 24). *Supra*, pp. 10-11. Since the normal useful life of a car ferry operated in salt water is only 80 per cent of such a ferry operated in fresh water, the court reduced the value of the *Maitland No. 1* by 20 per cent to $311,813.72. Next, the estimated necessary repairs of $34,980 (Finding 14, R. 9) were deducted. Finally, since it would have cost at least $115,000 to move the *Maitland No. 1* to the Atlantic Coast and fit her for salt water opera-

tion, that sum was also deducted, leaving a balance of $161,833.72 (R. 24). Although the court found that there had been an enhancement of $11,420 in the value of vessels on the Atlantic Coast between 1941 and 1942 because of the greater demand for vessels which occurred after the beginning of World War II (Finding 20, R. 13), such enhancement was ignored in making this computation.

The court, with two judges dissenting, concluded that the fair value at the time of taking was $161,833.72. Since petitioner was entitled to credit for the sum of $54,375 paid on June 10, 1944, interest was awarded respondent at 4 per cent per annum for delay in payment on $161,833.72 from August 20, 1942, to June 10, 1944, and on $107,458.72 from June 10, 1944 to date of payment (R. 24).

Judge Whitaker (with whom Madden, J. concurred) dissenting, was of the opinion that the capitalization of earnings was improper because "at the time of its requisition it was earning nothing and had earned nothing for quite a long time" (R. 24). Adverting to the price at which comparable vessels sold on the Florida East Coast, he pointed out that this basis for valuation "presupposes that the owner of this vessel on the Great Lakes would have been able to sell his vessel after he had transported it down there, and there is no showing whatever that it would have been able to do so. I feel quite sure that plaintiff would not have gone to the expense of $115,000 to transport

the vessel to the Florida East Coast in the hope of finding a purchaser there. Just compensation is to be determined not only as of the time of the taking but also as of the place of taking. * * * The War Shipping Administration fixed $72,500 as just compensation. I do not think the plaintiff has carried the burden of showing that this was incorrect" (R. 25).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In making an award of just compensation for the *Maitland No. 1* which was not based on a determination of the value the vessel had at the place of taking (the Great Lakes) but the value which it might have had if it were located on the Atlantic coast of Florida.

2. In making an award of just compensation for the *Maitland No. 1* (which was taken in August 1942), predicated upon a capitalization of respondent's realized earnings during the period from 1916 to 1932.

3. In making an award of just compensation for the *Maitland No. 1* which was not based on a determination of value at the time and place of taking.

4. In disregarding its findings of the evidentiary or primary facts in making its ultimate finding that "the fair value of the *Maitland No. 1* at the time of the requisition was $161,833.72."

5. In making an ultimate finding (that the fair value was $161,833.72) which was not sustained by its findings of the evidentiary or primary facts.

6. In failing to deduct, as required by Section 902 of the Merchant Marine Act of 1936, as amended, 46 U. S. C. 1242, from its ultimate finding of the fair value of the *Maitland No. 1*, the sum of $11,420 found to represent the enhancement of value due to the greater demand for vessels after the beginning of World War II.

7. In failing to make the ultimate finding that the fair value of the *Maitland No. 1* at the time and place of taking was no more than $72,500.

8. In failing to hold that respondent has not carried the burden of showing that the sum of $72,500 fixed by the War Shipping Administration as just compensation for the *Maitland No. 1* was incorrect.

9. In entering judgment for respondent in the amount of $107,458.72, with interest at 4 per cent per annum for delay in payment on $161,833.72 from August 20, 1942. to June 10, 1944, and on $107,458.72 from June 10, 1944 to the date of payment.

SUMMARY OF ARGUMENT

In fixing the fair value of the *Maitland No. 1*, the Court of Claims, disregarding the fact that the vessel could not be operated profitably as a car ferry on the Great Lakes and that its only value was for scrap or for secondary uses, fixed the value of the vessel by capitalizing past earnings, making

deductions therefrom for the cost of placing the vessel in a condition to operate between Florida and Cuba, and assuming a hypothetical situs for the vessel on the Florida East Coast. It undertook to fortify the value thus determined by relying upon a demand for a car ferry of the type of the *Maitland No. 1* in Florida and the Florida requisition-sale of two comparable vessels in 1942. It is submitted that this method of fixing fair value in a taking case has no basis either in law or reason.

1. The fixing of fair value is at the best an informed guess based upon the price on which an experienced buyer and an experienced seller would agree. If there is an active contemporaneous market, that normally furnishes the best evidence. Absent such a market, particularly in the case of a vessel, any value in excess of scrap must necessarily depend upon its prospective earning power, since no experienced buyer would purchase a vessel where no market for it existed and where there was no prospect of operating it profitably in the future. This is particularly true because of the high cost of maintaining a vessel for any extended lay-up.

In the instant case, the Court of Claims found that there was no market at the Great Lakes for a car ferry as such, nor any prospect that a car ferry of the type of the *Maitland No. 1* could operate at a profit in the future. It was unwilling to accept as a representative market the sales of comparable vessels for other purposes and proceeded to capi-

talize the past earnings of the *Maitland No. 1*, which earnings had ceased in 1932. It then made deductions from the figure so reached for the cost of repairing and equipping the vessel to operate in salt water, ascribing a Florida situs to it, and an ability there to operate at the same profit that respondent had realized from its operation on the Great Lakes prior to 1932.

Past earnings, of course, furnish no direct indication of present value. To the extent that earnings should be considered at all, it is only present and prospective earnings that have any relevancy, and past profits must be convincingly correlated to future earnings if they are to be admissible. In so far as the vessel's value at the Great Lakes was concerned, it had been laid up for ten years, and it was a liability, not an asset, without any prospect of further operation as a car ferry in that region.

Nor is there any evidence that respondent, or a purchaser, could or would have operated profitably in Florida. No evidence was introduced to show the earnings of comparable vessels and, much less, was any evidence introduced to show that respondent, or a purchaser, could have participated in that business. The history of similar vessels on the Great Lakes discloses that a close tie-up with a terminal railroad is essential to the profitable operation of the car ferry business. When the respondent operated profitably, it had such a tie-up, as it was in effect a subsidiary of the New York

Central and the Canadian Pacific railroads. There is nothing to show that respondent, or a new owner, had or could have obtained any working arrangement with comparable railroads in Florida. The net result of the method adopted by the court below is to establish the vessel's value on the basis of earnings that the *Maitland No. 1* might have had at some date prior to 1932. It was totally incompetent to establish value in 1942, the date of the taking.

2. In order to bolster the value for the *Maitland No. 1,* which it reached by capitalizing past earnings, the lower court relied upon its finding that in 1942 there existed a market for a vessel of that type in the Florida-Cuba car-ferry trade and that two comparable vessels which had been requisitioned by the United States in the same year had been valued by agreement of the parties at $332,500 each. As we read its findings and opinion it did not, however, find that this constituted a pertinent market nor did it ascribe that Florida value to the *Maitland No. 1,* and the decision below has no independent basis if the court erred in obtaining the vessel's value through capitalization of old profits. But the demand and sales in Florida in 1942 are irrelevant, either from the viewpoint of supporting the value reached by capitalizing past earnings or as establishing an independent market value for the *Maitland No. 1.*

It is settled law that value is to be taken as of the time and place of taking. The purpose of awarding just compensation is basically to treat the

owner of the requisitioned property with justice, and that end is achieved if he is paid the local value. Presumably, if he had desired to sell the article that is all he could have obtained. If he desired to replace the requisitioned article, he would be able to do so by purchasing a like article in the open market. If a greater value at some distant point is substituted therefor, it would normally result in a windfall to the owner. He could obtain that value and, if in excess of the local price, then replace the requisitioned article with one purchased at the place of the taking. There is nothing to show that respondent could not have done exactly that in the instant case.

Moreover, in a situation such as here presented where the owner is dissatisfied with an administrative determination of fair value, the burden is upon him to establish all elements necessary to support the higher valuation which he seeks. That burden petitioner has not met. It has not been found or established that the *Maitland* could not have been replaced at the Great Lakes or that respondent had any intention of taking the vessel to Florida, either for the purpose of operating or selling it. In these circumstances, we submit that even if the Florida valuation otherwise were a factor to be considered in determining fair value, respondent has failed to submit the supporting proof necessary to make that evidence relevant.

3. The fair value of $72,500 determined by the War Shipping Administration is both generous

and just. The scrap value of the *Maitland No. 1* at the time of the taking was $13,500. There was no market for it as a car ferry nor could any income be derived from its operation as such. Sales of five comparable vessels had occurred on the Great Lakes between 1936 and 1942, ranging in price from $24,000 to $65,000. These vessels had all been sold for uses other than that of a car ferry. We submit that these transactions represent the maximum value which the *Maitland No. 1* had. If these sales are inadequate to determine the potential market value for the *Maitland No. 1*, then no market for her existed at all on the Great Lakes and her value would only have been that of scrap, namely $13,500. In resolving this question in favor of respondent, we submit that the War Shipping Administration acted fairly and justly and that respondent should be limited to the value which WSA fixed.

ARGUMENT

In August 1942, the War Shipping Administration requisitioned the *Maitland No. 1*, a railroad car ferry belonging to respondent, at the Great Lakes, and fixed the sum of $72,500 as just compensation for the taking. Respondent was dissatisfied with this award and, as provided by statute, accepted seventy-five per cent thereof and brought suit in the Court of Claims to recover such additional sums as would, in its opinion, constitute just compensation. The court below found that at the time the *Maitland No. 1* was taken, she had been laid up for

eight years because the car transportation business for which she had been constructed had been diverted permanently to land routes; that there was no demand on the Great Lakes for a vessel such as the *Maitland* as a car ferry, the use to which she was best adapted; that the vessel had a scrap value of $13,500 at the time of the taking (R. 14); that she was adaptable for certain secondary, non-car ferry uses and there was a demand on the Great Lakes for such vessels for those secondary uses (R. 10) at prices ranging from $24,000 to $65,000 (R. 11, 13); that there was a demand on the Florida East Coast in 1942 for a vessel such as the *Maitland* for use as a car ferry between Florida and Cuba; and that the fair value of the *Maitland No. 1* at the time of the taking was $161,833.72 (R. 14). The Court of Claims' method of finding fair value was unique and unorthodox. It capitalized respondent's realized income from 1916 to 1932 from the operation of the *Maitland No. 1* on the Great Lakes and, despite the fact that the vessel had earned no income for over ten years because the business which had given rise to that income had disappeared, assumed, without finding or proof, that respondent would have realized such income in Florida. It then sought to bolster the value thus assigned to the vessel on a suppositious situs in Florida by relying upon a demand in 1942 for a vessel such as the *Maitland No. 1* on the Florida East Coast, some thousands of miles from the place of taking, and upon two requisition-sales in Florida of comparable

vessels at prices that somewhat approximated the value which it reached by capitalizing past earnings. We submit that these unusual rulings, which completely ignore the fair value of the vessel at the time and place of the taking, improperly depart from the accepted principles of fixing fair value in taking cases, and that the value of the *Maitland No. 1* fixed by the War Shipping Administration is fair and constitutes just compensation.

I

The Court Below Improperly Determined the Value of the *Maitland* by Relying Upon a Capitalization of the Realized Earnings of the Enterprise in Which She Was Used During the Period from 1916 to 1932 on the Great Lakes

A. The Fifth Amendment does not set forth any definite standards of fairness by which the measure of "just compensation" is to be determined and this Court has been careful not to reduce that concept to a formula. *United States* v. *Cors*, 337 U. S. 325, 332. The determination of just compensation is at best an "informed guess"—an approximation of what experienced traders, under no compulsion either to buy or to sell, would give or take for the property. Its accuracy depends upon the nature of the property and the available evidence of those factors which such experienced traders would consider. In an endeavor to find working rules that will do substantial justice, practical standards, including that of "market value," have been adopted. *Ibid.* Where the property concerned

is identical with, or similar to, units of property which are both contemporaneously and frequently traded, the standard of reference is the market price. *United States* v. *New River Collieries Co.*, 262 U. S. 341, 344; *United States* v. *Miller*, 317 U. S. 369, 374; *Kimball Laundry* v. *United States*, 338 U. S. 1, 6. However, where there is no such established market, recourse must be had to other standards to determine "market value."[2] Thus, consideration may be given to the cost of construction and, so far as relevant, acquisition cost, improvements, replacement costs, depreciation, earnings, physical condition, appraisals for insurance or other purposes, and any other relevant factors upon which a reasonable judgment as to value may be based.[3] These factors are given such weight as it may be presumed they would have in fair negotiations between an experienced seller willing to sell and an experienced purchaser under no compulsion to buy.

In ascertaining the fair value of a vessel, where no market value can be established, the starting point is its minimum value as scrap (in this case $13,500 at the time the vessel was requisitioned). Any value in excess thereof primarily depends on prospective earnings, as the vessel's fair value "ex-

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[2] Whether the sales have been sufficient in number or typical in character to establish a market is, of course, a question to be decided in each case and is not subject to generalization.

[3] See Rule 3, Report of the Advisory Board on Just Compensation to the War Shipping Administration, 1943 A. M. C. 1443.

ceeds its value as scrap only on the assumption that it is income-producing." *Kimball Laundry* v. *United States*, 338 U. S. 1, 9. The best evidence of the earnings of a vessel is the rate at which it can be chartered bareboat; otherwise, the business acumen of the owner or operator of the vessel can be separated only with great difficulty from the earning capacity of the vessel itself.[4]

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[4] It must be borne in mind that that which is requisitioned is not the business enterprise of the owner but a vessel which was used in the business. Whatever the merits of capitalization of income when an entire business enterprise such as a public utility is condemned (1 Bonbright, *Valuation of Property* (1937) ch. XI, XII, XVI, *passim;* Orgel, *Valuation under Eminent Domain* (1936) ch. XIV, XV, XVII-XIX, *passim;* cf. *Kimball Laundry* v. *United States*, 338 U. S. 1, 16), capitalization can be misleading when employed to estimate the value of property owned by the business enterprise. Cf. II Lewis, *Eminent Domain* (3rd ed. 1909) § 727; Nichols, *Eminent Domain* (2d ed. 1917), pp. 1171-1173 (realty). Before such evidence can properly be considered competent, measurable shares of the total earnings should be allocated to the representative income-producing factors of invested capital, management skill, and general business conditions. Without such allocation, it is apparent that awards of just compensation for identical units of property, if based on capitalization of earnings, would vary in accordance with the managerial skill of the owners thereof. Without such allocation, awards of just compensation might well differ for identical units of property under a single ownership. For example, sister ships owned by the same shipping company may be employed on routes which differ in their profitability. We think it clear that the law of just compensation does not call for such incongruous results. The Fifth Amendment requires that compensation be made for values which have an external validity, not for the property's subjective value to the owner. Cf. *United States* v. *Petty Motor Co.*, 327 U. S. 372, 377-378; *Kimball Laundry* v. *United States*, 338 U. S. 1, 5. If the technique of capitalization be deemed appropriate in any particular case, the proper subject of capitalization would appear to be the bareboat charter rate of the vessel rather than the earnings of the vessel. Cf. Orgel, *Valuation under Eminent Domain* (1936), pp. 533, 562, fn. 2 (rentals compared with business profits as evidence of market value of real estate).

Furthermore, a vessel which cannot be operated profitably is a source of constant expense to its owner, as it is necessary to provide wharfage, watchmen, and caretakers as well as a minimum upkeep during the period when the vessel is laid up. Such expenditures can be justified economically only on the expectation that the vessel may again become income producing.

And it is also plain that, in determining *present* value, the *capitalization of past income* of any type is meaningless as such, in the absence of a demonstrated correlation between the amount, type, and rate of past and future income. "When earnings have once been 'realized', so that they can be expressed with some approach to accuracy in the company's accounts, they are already water under the mill and have no direct bearing on what the property in question is now worth. Value, under any plausible theory of capitalized earning power, is necessarily forward looking. It is an expression of the advantage that an owner of the property may expect to secure from the ownership in the future. The past earnings are therefore beside the point, save as a possible index of future earnings." 1 Bonbright, *Valuation of Property*, p. 250. Even if no projection of future earnings is expressly made, "past earnings can be used as a basis of capitalization only on the assumption that they will continue." *Kimball Laundry* v. *United States*, 338 U. S. 1, 17, fn. 9.

B. In the instant case, the evidence conclusively established that the *Maitland No. 1* had no prospective earning capacity as a car ferry on the Great Lakes and the Court of Claims refused—we think erroneously, see *infra* pp. 33-42—to accept sales of comparable vessels there made for secondary purposes as establishing fair value. Therefore, in order to fix a value in excess of that made by the War Shipping Administrator, it felt "compelled to resort to a consideration of the earnings of the *Maitland No. 1* during the time that the vessel was actually operated as a car ferry * * *" (R. 23). By capitalizing the average annual income of $42,816.36 earned by respondent from 1916 to 1932 at an annual rate of 10% for the estimated remaining twenty-four years of use for the ship, and attributing an average mean residual value of $50,000 to it as an obsolete car ferry, the court obtained the basic sum of $389,767.15 (R. 23). Adjustments were then made to obtain a value for the *Maitland* based on a hypothetical Florida East Coast location, where a demand for car ferries did exist.[5]

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[5] No exception has been taken to the finding of the lower court that a demand did exist, at the time of taking, on the Florida East Coast for a vessel such as the *Maitland No. 1* for use as a car ferry (Finding 20, R. 12). But no finding was made nor was evidence submitted that this "demand" had reflected itself in the Great Lakes market. The only sale at the Great Lakes of a comparable vessel for Florida-Cuba operation occurred in 1945 at a price of $50,000 (R. 12). Moreover, it should be pointed out that the court made no finding that respondent would have been able successfully to engage in the business of car transportation in Florida nor that it would have been able to sell the vessel had it been transported there. See *infra*, pp. 28-30, 37-39.

Since the normal useful life of a car ferry operated in salt water is only 80% of one operated in fresh water, the court reduced the value of the *Maitland* by 20% to $311,813.72. Next, estimated necessary repairs of $34,980 were deducted. Finally, since it would have cost at least $115,000 to move the *Maitland* to the Florida East Coast and fit her for salt water operation, that sum was also deducted, leaving a balance of $161,833.72 as just compensation.[6] (R. 23-24.) *Supra,* pp. 12-13.

We submit that there is no basis in logic nor in law which supports the action of the court below in assigning a value to the *Maitland* grounded on capitalization of respondent's realized income from 1916 to 1932. In 1942, respondent had no current earnings nor any prospects of deriving any earnings from the *Maitland No. 1* as a car ferry. It had not operated its car ferry line since June 1932. At no time since that date has there been traffic sufficient to justify vessel operation (Finding 11, R. 8). Thus, in the absence of a showing of a bareboat charter market for the *Maitland,* it would appear that the *Maitland* had no value at all, other than salvage, unless it could be sold for a secondary use. It is inconceivable that a "willing buyer" would give any weight at all to such past earnings. If the *Maitland* had no market value as a car ferry because it could earn no income as a

[6] No deduction was made by the court below for the risk involved in transporting the ship to Florida. Cf. McCormick, *Damages* (1935), p. 182.

car ferry, it can hardly be urged that the value of the *Maitland* as a car ferry may, nevertheless, be measured by its past earnings.

We think it clear that respondent's ancient earnings offer no guide, on any theory, to the prospective income that might be derived from the *Maitland.* During the sixteen and one-half years of operation of the *Maitland,* the average annual net income of respondent fluctuated as follows: 1916-1921—$17,216.28; 1921-1922—net loss; 1925-1928—$129,893.92; 1930-1932—net loss (Finding 10, R. 6). On its face, such variation in income shows that respondent's earnings were not typical of the earnings of similar vessels but were the result of facts peculiar to respondent's ownership. The record shows that respondent's income was derived mainly from respondent's status as a subsidiary of the railroad companies which it served. Thus, its earnings varied with the adequacy of all-rail routes (R. 6-8). The record further shows that the bulk of the freight carried by the *Maitland* was coal; income fluctuated with the coal tonnage carried (R. 6). Plainly, earnings resulting from these factors are incompetent evidence of the earnings which might be earned by a vessel such as the *Maitland* as a car ferry between Florida and Cuba under entirely different operating conditions, and probably a different management.

In addition, there is no finding or evidence that respondent or any potential purchaser, could have engaged in the car ferry business between Florida

and Cuba at all, much less that it could have done so profitably. The findings in the instant case compel the conclusion that a close tie-up with one or more railroads is necessary for the successful operation of a car ferry (R. 6, 10, 19). For example, the Pennsylvania R. R. continues to operate a Great Lakes car ferry (R. 19) but it has never been suggested that respondent could take over all or any part of that business. During the period respondent operated profitably on the Great Lakes, it was a subsidiary of the Toronto, Hamilton and Buffalo Railway Company, whose stock in turn was owned by the New York Central and Canadian Pacific Railroads (R. 16). No other competed with it for that business. To assume that any car ferry could procure business in Florida in the absence of a working agreement with a terminal railroad there is to ignore realities.[7]

One final factor, ignored by the court below, further discloses the fallacy of its reasoning that the ship could have been engaged profitably as a car ferry, and that is that, if this were so, demand and earning capacity on the Florida East Coast for Great Lakes' car ferries would probably have reflected themselves in the Great Lakes market. While the court found that Great Lakes' car ferries had been sold and converted into ocean-going car ferries (R. 11) and that such ferries have proven

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[7] The case of the *He ; M. Flagler*, a Florida car ferry, which in 1941 was sold for $100,000 to a private purchaser who did not employ it in the car ferry business (R. 12) underscores this point.

satisfactory for car ferry service between Florida and Cuba (R. 12), it did not find when or the price at which these ferries were sold nor did the evidence before it throw any light on the subject. In the one instance in which evidence was available, the court found that a Great Lakes' car ferry, which was purchased in 1945 on the Great Lakes and transported to the Florida East Coast for use between there and Cuba, sold for $50,000 (R. 12). It is significant to note that that sale was to the West Indies Fruit and Steamship Company, which presumably had a car ferry business in which the purchased vessel could be employed. In view of all these factors, it is sheer speculation to assume that the *Maitland* as an ocean car ferry could equal its past income as a fresh water ferry, and, we submit, to fix its fair value on such a highly unrealistic and suppositious income, is totally unwarranted.

It is apparent, therefore, that the judgment below is, at most, an award of just compensation based on the value of the *Maitland* long prior to 1932, an award which the vessel's history after that date shows to be grossly erroneous for a 1942 taking. The judgment below thus violates the unquestioned rule that value is to be determined as of the time of taking. See *United States* v. *Miller*, 317 U. S. 369, 374; *Kieselbach* v. *Commissioner of Internal Revenue*, 317 U. S. 399, 403; *Danforth* v. *United States*, 308 U. S. 271, 283; *Brooks-Scanlon Corp.* v. *United States*, 265 U. S. 106, 123; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 76; *Mononga-*

hela Navigation Co. v. *United States,* 148 U. S. 312, 341.

We therefore submit that the Court of Claims erred in determining just compensation for the requisitioned vessel by capitalizing respondent's past earnings.

II

A Demand Existing in Florida for a Vessel of the Type of the *Maitland*, and the Contemporaneous Requisition Sales of Two Comparable Vessels in 1942 in Florida, Furnish No Support for the Valuation Fixed by the Court Below Through Capitalization of Past Earnings

In order to fortify its finding of value based on its capitalization theory (*supra* pp. 12-13, 26-27), the court below adverted to its findings that a demand existed in Florida in 1942 for a vessel such as the *Maitland No. 1* and that two comparable vessels, which the United States requisitioned in the same year in Florida, had their value fixed by agreement of the parties at $665,000 for both or $332,500 for each (R. 21, 24). The court, however, did not rely upon these figures as establishing a firm Florida market value, nor did it attempt to fix the value of the *Maitland No. 1* by Florida market prices. Had it done so, the starting point of its calculations would have been $332,500 and not $389,767.15, the capitalized past earning figure upon which it rested. Moreover, although the court below found that there had been an enhancement of $11,420 in the value of vessels on the Atlantic Coast between 1941 and 1942 because of the greater demand for vessels which occurred after the beginning of World War

II (Finding 20, R. 13), such enhancement was ignored in making its computation. That sum would be subject to deduction under the doctrine of *United States* v. *Cors*, 337 U. S. 325, had the Florida sales been held to be the norm of fair value. It follows from the wholly secondary use made by the Court of Claims of the Florida demand that its decision cannot stand at all if the capitalization theory of valuation is incorrect. In any event—whether the findings as to the Florida demand are merely support for a valuation based on capitalization of past income or whether they are intended as an independent market valuation of the vessel—we submit that sales of comparable vessels in Florida are not evidence either of the prospective earning capacity of the *Maitland No. 1* nor of its value for the purpose of fixing just compensation for a Great Lakes taking.

A. The general rule is that just compensation for personal property must be determined as of the place of taking when there is a market for the commodity at that spot. See *United States* v. *New River Collieries Co.*, 262 U. S. 341, 344; *Davis* v. *Newton Coal Co.*, 267 U. S. 292, 301. Although recognized by this Court only in dicta, the rule finds firm support in the over-all law of damages. In actions for breach of contract, the market value at the time and place where the contract should have been performed is the basis for assessing damages, and, in cases of wrongful destruction of, or injury to, personal property, the market value of the place

of wrong is used. See McCormick, *Damages* (1935), § 47; 2 Sedgwick, *Damages* (9th ed. 1912), § 434; 3 Williston, *Sales* (Rev. ed. 1948), §§ 596, 597, 599, 599e. Since the purpose of the judgment in all these cases is to indemnify the plaintiff for his loss, without more,[8] an award of market value at the time and place of wrong or taking constitutes a fair measure of the loss because that is the sum for which the plaintiff would presumably have sold the property to another or could have replaced it for his own use. Market value at any place other than the place of taking is thus irrelevant, unless, of course, it is reflected in market value at the place of taking.

Here, the court below concedes that there were a number of uses for the *Maitland* for which a demand existed in 1942 on the Great Lakes (Finding 18, R. 10), and the findings reveal that (aside from the 1937 sale of the vessel itself) five vessels of the car-ferry type had been sold on the Great Lakes, during the period from 1936 to 1942, at prices ranging from $24,000 to $65,000 (Findings 18-21,

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[8] *Bauman* v. *Ross*, 167 U. S. 548, 574; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 76; *Seaboard Air Line Ry. Co.* v. *United States*, 261 U. S. 299, 304; *United States* v. *New River Collieries Co.*, 262 U. S. 341, 343; *Brooks-Scanlon Corp.* v. *United States*, 265 U. S. 106, 126; *Standard Oil Co.* v. *So. Pacific Co.*, 268 U. S. 146, 155; *Olson* v. *United States*, 292 U. S. 246, 255; *United States* v. *Miller*, 317 U. S. 369, 373; I Bonbright, *Valuation of Property* (1937), pp. 408-409; McCormick, *Damages* (1935), § 44; Restatement, *Contracts* (1932), § 329, comment *a*; 1 Sedgwick, *Damages* (9th ed. 1912), § 244; 5 Williston, *Contracts* (Rev. ed. 1937), § 1338; 3 Williston, *Sales* (Rev. ed. 1948), § 599.

R. 10-14).[9] *Infra,* pp. 39-42. But it disregarded this definite home market because there was no demand in that vicinity for the use to which the vessel was best adapted (R. 23). Since there was a demand on the Florida East Coast for such vessels for use as a car ferry, the court below concluded that the fair value for the *Maitland* must be based on a putative Florida location.

In reaching this result, the Court of Claims relied upon the language of this Court in *Olson* v. *United States,* 292 U. S. 246, 255:—"The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as a measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held." *See* also *Boom* v. *Patterson,* 98 U. S. 403, 408; *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53, 81; *United States ex rel. T. V. A.* v. *Powelson,* 319 U. S. 266, 275; 2 Lewis, *Eminent Domain* (3rd ed. 1909) § 706; 1 Nichols, *Eminent Domain* (2d ed. 1917) § 219. But this language concerns the con-

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[9] In its unique method of calculating value by capitalization of past profits, the court below based its calculation on the value of an obsolete car ferry and assessed the latter value, which it characterized as "the average mean residual value", at $50,000 (R. 23). The residual value at the Great Lakes was for use as automobile ferries or bulk pulpwood carriers. Just how that "residual value" would attach to the hypothetical situs of the vessel at Florida, the court below does not explain. If the court had adopted the Florida sales as an independent basis of its valuation, it would have had to make a finding as to the vessel's residual value in Florida.

demnation of land; it should not be literally applied, as a formula, to cases involving the taking of personal property. Cf. *United States* v. *General Motors Corp.*, 323 U. S. 373; *United States* v. *Cors*, 337 U. S. 325; *Kimball Laundry* v. *United States*, 338 U. S. 1, 15. As applied to land, the words "in the community" implicitly follow after the phrase "highest and most profitable use for which the property is adaptable and needed." In effect, the court below has substituted "anywhere" for "in the community." We think that substitution is unwarranted. True, there is an important distinction between land and personalty—personal property is mobile. If the owner of personal property wishes to sell his property, he may have a choice of markets.[10] If, because of peculiarities of market conditions at the location of his property, the value of it is less than its value in some other place, he may remove it to the more favorable spot. Thus, personalty may have as many market values as there are "markets", and its selling price is not necessarily circumscribed by the existing wants of the community in which it is located.

However, for eminent domain purposes, we submit that the only relevant market value is the value at the place of taking, at least in the absence of proof by the owner that he would actually have dealt in other places. Such market value fully

[10] The choice is, of course, very far from unlimited; it may be restricted by the owner's ability and desire to finance the cost and risks of transportation, and by the owner's knowledge of market conditions.

meets the standards of fairness and substantial justice which this Court has frequently held are the only basic measures of the compensation prescribed by the Constitution. Cf. *United States* v. *Miller,* 317 U. S. 369, 375; *United States ex rel. T. V. A.* v. *Powelson,* 319 U. S. 266, 279, 280; *United States* v. *Petty Motor Co.,* 327 U. S. 372, 377-378; *United States* v. *Cors,* 337 U. S. 325. As noted above, "the owner is to receive no more than indemnity for his loss." *United States* v. *Miller, supra,* at 375. Market value at the time and place of taking is the best measure of that indemnity because that is the sum for which the owner would presumably have sold the property to another or could have replaced it for his own use. To select the location of greatest value, as the Court of Claims did here, would grant a windfall to the owner who would receive more than he could probably have gotten from a private purchaser or than he would have had to pay for a replacement.

Even if the owner makes convincing proof that he would actually have sold his property in those other markets, it does not follow that he is entitled to a higher compensation. If the property could have been replaced at the place of taking, the owner is indemnified by an award of market value at that place. The law of just compensation requires that the owner be awarded the value of his property, not a profit on the property. "In absence of a statutory mandate * * * the sovereign must

pay only for what it takes, not for opportunities which the owner may lose." *United States ex rel. T. V. A.* v. *Powelson, supra,* at 281-282. And the price at which the owner could purchase a replacement certainly forms the maximum limit of the property's value.

Thus, we submit that the proper inquiry is not what might be the value of the property for a particular use if it were located at some other part of the country, but what it is worth at the place of taking, giving full consideration to the prospect of its being needed for the particular use in the reasonably near future, and to any other use to which it is reasonably adaptable. If a particular use does not affect the market price at the place of taking because of the character of the existing demand, the concept of just compensation as indemnification does not require that resort be had to other, distant markets.

B. On respondent rests the burden of proving all the elements of its claim for just compensation, particularly where, as here, it appeals from the adequacy of an administrative finding of value. *United States ex rel. T. V. A.* v. *Powelson,* 319 U. S. 266, 273; *United States* v. *John J. Felin & Co., Inc.,* 334 U. S. 624, 631; *Westchester County Park Commission* v. *United States,* 143 F. 2d 688, 692 (C. A. 2); *Welch v. T. V. A.,* 108 F. 2d 95, 101 (C. A. 6); *Ralph* v. *Hazen,* 93 F. 2d 68, 70 (C. A. D. C.). It made no proof that it would have operated or at-

tempted to operate, or would have sold or attempted to sell, the *Maitland No. 1* on the Atlantic Coast of Florida. Owners of bulky property, like ships, do not ordinarily expend large sums (here, $115,000) for transportation to higher markets on the off chance that a sale might be made there at a better price. Nor did respondent make any showing that the *Maitland* could not have been replaced at the Great Lakes for the sum awarded by the War Shipping Administration as just compensation ($72,500). And there did exist a market on the Great Lakes, for secondary uses, in which respondent probably could have sold the ship. *Infra*, pp. 39-42. The Court of Claims made no finding that respondent would have been able to sell the vessel had it been transported to the coast, nor that respondent would have gone to the expense of placing the *Maitland* on the Florida market in the hope of finding a purchaser. The court likewise made no finding that a demand existed on the Great Lakes for vessels of this type to be transported to the Atlantic seaboard and fitted for operation as an ocean car ferry.[11]

We accordingly submit that the existence of a market for a vessel of the type of the *Maitland No. 1*, and the requisition-sale of two comparable vessels in Florida in 1942, formed no basis of support for the value assigned to the vessel by the court below,

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[11] In fact, the only comparable vessel that was acquired for such purpose sold for $50,000 (R. 12), less than the administrative award offered respondent. See *supra*, pp. 11, 26.

either when viewed as bolstering the value obtained, as it was, by capitalization of past earnings, or as independent evidence of a market in which the vessel could be sold.[12]

III

The Findings Disclose That the Value Assigned to the *Maitland* by the War Shipping Administration was Generous

The evidentiary findings of the Court of Claims reveal the existence of a definite home market for vessels such as the *Maitland No. 1*.[13] In addition to the repurchase of the *Maitland* by respondent in 1937 for $92,894.80 (Finding 12, R. 8), between 1936 and 1940 three car ferries similar to the *Maitland* were sold to the Michigan Highway Department for conversion to highway ferries. Of the three, two were built to the same plans as the *Maitland*. The first purchase made by the Michigan Highway Department was the smaller car ferry *Ann Arbor No. 4* in 1936 for $25,000. Identical in design with the *Maitland*, but somewhat older, were the *Pere Marquette No. 20*, purchased in 1938 for $50,000, and the *Pere Marquette No. 17*, purchased in 1940 for $65,000 (Findings 18, 19, R. 10-11). Be-

[12] If any effect was given to the Florida sales by the lower court, it erred in not deducting from the value it found for the *Maitland* the enhancement of $11,420 which occurred, as the court found, between 1941 and 1942 in the market price of vessels on the Atlantic Coast because of the greater demand for vessels after the beginning of World War II (Finding 20, R. 13). *United States* v. *Cors*, 337 U. S. 325.

[13] The court expressly found that in 1942 "there were a number of secondary uses for the vessel for which a demand did exist at that time" on the Great Lakes (R. 10).

tween 1940 and 1942, two other comparable car ferries, built to the same plans as the *Maitland,* were sold for conversion to the bulk carriage of pulpwood, the purchasers removing the engines and tearing off the superstructure of the vessels. In July 1940, the Pere Marquette Railway sold the *Pere Marquette No. 19* for $24,000; in March 1942, the *Marquette and Bessemer No. 2,* owned jointly by the Pere Marquette Railway and the Marquette and Bessemer Dock and Navigation Company, was sold for $37,724.04 (Finding 21, R. 13).

Thus, aside from the 1937 sale of the *Maitland* itself, five vessels of the *Maitland* type had been sold during the period 1936 to 1942 at prices ranging from $24,000 to $65,000. Although there were differences in the physical condition of these vessels, and varying amounts would have been needed to place them in operating condition as car ferries, we believe that these sales, nevertheless, establish a usable market value for the *Maitland.* The demand for the *Maitland* which the court below found to exist in 1942 at the Great Lakes was a demand for secondary uses and not for use as a car ferry (Finding 18, R. 10). Differences in the physical condition of these vessels in relation to their use as car ferries are, to a great extent, irrelevant to their market values as highway ferries or bulk carriers. Since the ships were sold for secondary uses, the only differences in condition which might materially affect market price would be the relative adaptability to these secondary uses. And it is

questionable whether those differences are critical. Although both Pere Marquette vessels were sold for comparable prices, being approximately the same age and in the same physical condition, $215,000 was spent in remodeling the *No. 20* and $534,000 on the *No. 17* for use as highway ferries (Finding 19, R. 11). [14]

We believe that these sales, although not numerous, are typical and do permit the court to make an "informed guess" as to the value of the *Maitland No. 1.*[15] Presumably, that value would be between $40,345, the average price paid on these sales, and $65,000, the highest price. It is significant that this corresponds closely with the book value of the *Maitland,* as shown on respondent's records on the date of requisition, which was $75,509.51 (Finding 15, R. 9). See fn. 1, *supra,* p. 6. And if we may make this appraisal with the benefit of hindsight,

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[14] The Court of Claims found that "In 1942, the *Maitland No. 1* could have been adapted for use as a highway ferry, for transporting automobiles and passengers on the Great Lakes or similar bodies of fresh water involving no greater length of haul. The vessel could have been converted for that purpose more economically and more quickly than for any other use, since the principal change that would have been required was the placing of an asphalt cover over the rails on the car deck to accommodate automobiles." (R. 10)

[15] As this Court has recently pointed out again, market value in eminent domain proceedings is not a fact but an appraisal postulated on a hypothetical sale. Since a transfer brought about by eminent domain is not a voluntary exchange, value can be determined only by a guess, as well informed as possible, as to what the price would have been had a voluntary exchange taken place. Cf. *United States* v. *Miller,* 317 U. S. 369, 375; *Kimball Laundry* v. *United States,* 338 U. S. 1, 6; 1 Bonbright, *Valuation of Property* (1937), pp. 59-60, 414; McCormick, *Damages* (1935) § 44; 1 Nichols, *Eminent Domain* (2d ed. 1917) § 217, 222.

it should be noted that, shortly after the cessation of hostilities in World War II, a comparable car ferry was sold on the Great Lakes for $50,000 for conversion for use as a car ferry between Florida and Cuba (Finding 20, R. 12). Since the sum fixed by the War Shipping Administration was $72,500, we submit that that sum is the maximum limit of the fair value of, and just compensation for, the *Maitland*.

If, however, these sales do not represent the price upon which an experienced seller and an experienced buyer would agree, then there is no pertinent evidence of value above the scrap value ($13,500). It is admitted that the vessel could not profitably be operated on the Great Lakes as a car ferry and no experienced buyer would purchase her for such purposes. If the sales for other uses are too infrequent to support a value for the vessel, then there was no market and the vessel could not be sold for more than its scrap value. Again, the experienced buyer would not pay a higher price for her on the off chance that he might eventually find a purchaser for a secondary use. The high cost of her upkeep during a prolonged lay-up would preclude that.

In these circumstances, we submit that the value fixed by the War Shipping Administration was generous, made full allowance for any value that the vessel had, and constituted just compensation.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed and the case remanded to the Court of Claims with directions to enter judgment only for the unpaid twenty-five per cent of $72,500 awarded to respondent by the War Shipping Administration as just compensation for the taking of the *Maitland No. 1*.

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SEPTEMBER, 1949.

APPENDIX

Section 902 of the Merchant Marine Act of 1936, as amended, 53 Stat. 1254, 1255 (46 U. S. C. 1242) provides, in part, as follows:

> (a) Whenever the President shall proclaim that the security of the national defense makes it advisable or during any national emergency declared by proclamation of the President, it shall be lawful for the Commission to requisition or purchase any vessel or other watercraft owned by citizens of the United States, or under construction within the United States, or for any period during such emergency, to requisition or charter the use of any such property. The termination of any emergency so declared shall be announced by a further proclamation by the President. When any such property or the use thereof is so requisitioned, the owner thereof shall be paid just compensation for the property taken or for the use of such property, but in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use. If any property is taken and used under authority of this section, but the ownership thereof is not required by the United States, such property shall be restored to the owner in a condition at least as good as when taken, less ordinary wear and tear, or the owner shall be paid an amount for reconditioning sufficient to place the property in such condition. The owner shall not be paid for any consequential damages arising from a taking or use of property under authority of this section.
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(d) In all cases, the just compensation authorized by this section shall be determined and paid by the Commission as soon as practicable, but if the amount of just compensation determined by the Commission is unsatisfactory to the person entitled thereto, such person shall be paid 75 per centum of the amount so determined and shall be entitled to sue the United States to recover such further sum as, added to said 75 per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section 24, paragraph 20, and section 145 of the Judicial Code (U. S. C., 1934 edition, title 28, secs. 41, 250).

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